84-815

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LAWRENCE W. BLACKMON, JR., BLACKMON & ASSOC., INC., and SMITHWICK-BLACKMON, INC.,
Petitioners

V.

UNITED STATES OF AMERICA and PINEY WOODS APARTMENTS, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

62pp

QUESTIONS PRESENTED

In the appeal of the district court's Judgment, the Petitioners argued that the causes of action brought by the Respondents were time-barred by the applicable statute of limitations. The court of appeals held that the statute of limitations barred the Respondents' causes of action because there was no record evidence to support a tolling of the statute, but ordered a dismissal of only two of the three Petitioners without explanation.

1. Whether the court of appeals erroneously failed to dismiss the cause of action as to all three Petitioners, as there was no record evidence to support a distinction between them.

2. Whether the court of appeals erroneously found the notice of appeal deficient and improperly limited the scope of the appeal in contravention of the liberal rules of construction of Rule 3 of the Federal Rules of Appellate Procedure as established by this Court.

LIST OF PARTIES

All of the parties are listed in the caption.

CORPORATE PARTY AFFILIATIONS

Smithwick-Blackmon, Inc. is a now defunct Arkansas corporation, which was owned fifty percent (50%) by Smithwick, Inc. and fifty percent (50%) by Blackmon & Assoc., Inc. Blackmon & Assoc., Inc. is owned by Lawrence W. Blackmon, Jr., and has no other subsidiaries, parent companies or affiliates.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LAWRENCE W. BLACKMON, JR., BLACKMON & ASSOC., INC., and SMITHWICK-BLACKMON, INC.,
Petitioners

V.

UNITED STATES OF AMERICA and PINEY WOODS APARTMENTS, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Lawrence W. Blackmon, Jr. ("Blackmon"), Blackmon & Assoc., Inc. ("B&A") and Smithwick-Blackmon, Inc. ("S-B"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, p. 1a-4a) was unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1984. (App. A, p. 1a-4a). The court of appeals' order denying petitions for rehearing and motion for technical correction was entered on August 22, 1984. (App. A, p. 7a). The court of appeals' mandate

issued September 5, 1984. (App. A, p. 9a). Leave to file a supplementary motion for rehearing and motion to amend or clarify notice of appeal (App. C, p. 32a-39a) was denied on September 25, 1984 (App. A, p. 8a). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) (1982).

STATUTES INVOLVED

1. Rule 3 of the Federal Rules of Appellate Procedure provides in pertinent part:

> (c) **Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

2. Ark. Stat. Ann. §37-206 (1962) provides:

> The following actions shall be commenced within three (3) years after the passage of this act, when the cause of action shall not have accrued at the taking effect of this act, within three (3) years after the cause of action shall accrue: First, all actions (of debt) founded upon any contract, obligation, or liability, (not under seal and not in writing,) excepting such as are brought upon the judgment or decree of some court of record of the United States, of this, or some other State; (second, all actions upon judgments rendered in any court not being a court of record;) third, all actions for arrearages of rent (not reserved by some instrument in writing, under seal;) fourth, all actions (of account, assumpsit, or on the case,) founded on any contract or liability, expressed or implied; fifth, all actions for trespass on lands, or for libels; sixth, all actions for taking or injuring any goods or chattels.

3. Ark. Stat. Ann. §37-209 (1962) provides:

> Actions on promissory notes, and other instruments in writing, not under seal, shall be commenced within five (5) years after the cause of action shall accrue, and not after.

STATEMENT

1. Factual Background

The United States, on its own behalf and as the assignee of the rights of Piney Woods Apartments, Inc. ("Piney Woods"), brought an action based on a contract entered into by Piney Woods and S-B for the construction of a multiple-family housing project insured by the Department of Housing and Urban Development ("HUD") in Pine Bluff, Arkansas. On June 12, 1969, S-B submitted to Piney Woods a Certificate of Actual Cost that falsely reflected the costs incurred in the construction of the housing project. A criminal indictment against Blackmon arising out of such incident was made public on July 12, 1974. Blackmon pled guilty to having knowingly and intentionally submitted a false Certificate of Actual Cost for the project for the purpose of influencing the action of HUD. *See* 18 U.S.C. §1010 (1982). The United States, on its own behalf and as assignee of the claims held by Piney Woods against Blackmon and S-B, filed an action for breach of contract and for fraud and deceit on July 7, 1977. The United States has suffered no damages as a result of the actions of the Petitioners; therefore, the state statute of limitations applicable to Piney Woods' claims would be either three years for damages caused by tort or five years for damages caused by breach of contract. Ark. Stat. Ann. §37-206,-209 (1962).

2. Proceedings Below

Suit was instituted in the United States District Court for the Eastern District of Arkansas, which had jurisdiction under 28 U.S.C. §§1331 and 1345 (1982). The district court found that the cause of action did not accrue for purposes of the statute of limitations until July 12, 1974, the date the indictment against Lawrence Blackmon was first made public. (App. B, p. 16a-17a). Having decided the suit was timely filed, the court gave judgment to the United States and Piney Woods on the merits. (App. B, p. 22a-24a). The district court entered judgment in favor of the United States against Blackmon and S-B and in favor of Piney Woods against B&A. Defendants thereafter gave Notice of Appeal to the Court of Appeals for the Eighth Circuit (App. C, p. 27a).

The Eighth Circuit reversed the judgment entered by the district court in favor of the United States and remanded the case with direc-

tions that the cause of action brought by the United States against Blackmon and S-B be dismissed as untimely filed. The Eighth Circuit held that it was clearly erroneous for the district court to assume that the United States and Piney Woods first became aware of the cause of action when the criminal indictment against Blackmon became public when, in fact, no evidence was presented to support that conclusion (App. A, p. 3a). The court found that the plaintiffs had failed to meet their burden of proof with respect to the tolling of the statute of limitations. (App. A, p. 3a-4a). Inexplicably, however, the Eighth Circuit did not reverse the judgment as to Piney Woods.

Without understanding the reason for the Eighth Circuit's failure to reverse the judgment as to Piney Woods, the appellants' petitioned for rehearing and, in the alternative, moved for technical correction. (App. C, p. 28a-30a). As is evident from the Appellee's Response to Appellants' Petition for Rehearing, the United States also failed to perceive why the Eighth Circuit had not reversed as to Piney Woods after it had found an insufficient factual basis for tolling the statute of limitations. Both the appellants' and the appellee's petitions for rehearing were denied without comment by the Eighth Circuit. (App. A, p. 7a). Thereafter, appellants filed a supplemental petition for rehearing and moved to clarify the notice of appeal (App. C, p. 32a-39a), but the court denied leave to file. (App. A, p. 8a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the construction and interpretation of the Federal Rules of Appellate Procedure and in particular the apparent departure in this case by the Eighth Circuit from long established precedent adopting a liberal construction of those rules for the purpose of effectuating an appeal as intended by the parties. Further, the Eighth Circuit's illogical and unreasonable action in this case has left both the Petitioners and the Respondents confused and bewildered, especially since the court has refused to explain its action in its written opinion or subsequent orders.

Having reached the conclusion that there was no evidence in the trial court record to substantiate a tolling of the statute of limitations, the Eighth Circuit directed the district court to dismiss two of the

three identically situated Petitioners. Petitioners surmised, although without guidance from the Eighth Circuit, that the notice of appeal may have been defective, but the Eighth Circuit refused to consider Petitioners' motion to clarify or correct that defect. If indeed the defect was the basis for the illogical result, the Eighth Circuit's failure to dismiss Blackmon & Assoc., Inc. would be based only on a pleading technicality and not on an interpretation of the record on appeal and applicable law. Such action is in direct conflict with the essential spirit of federal appellate procedure as established by this Court and the various courts of appeals.

In the interest of justice, this Court should take up the issues herein and reaffirm, by a reversal of the action of the Eighth Circuit, the long tradition of a flexible interpretation of the rules governing appeals in this country. A proper application of the law to the facts of a particular case must continue to take precedence over the technicalities of pleading, for such is the essence of American jurisprudence.

I. The court of appeals erroneously failed to dismiss the cause of action brought by Piney Woods against B&A since there was no record evidence to support a distinction between the Defendants.

The Eighth Circuit correctly applied the federal fraudulent concealment rule and the Arkansas tolling doctrine to the facts of this case and properly dismissed the cause of action brought by the United States against Blackmon and S-B. *See Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271, 278 n.9 (8th Cir. 1962) (federal fraudulent concealment rule), *cert. denied*, 373 U.S. 914 (1963); *Salinger v. Black*, 68 Ark. 449, 60 S.W. 229, 230 (1900) (tolling doctrine required plaintiff to prove how and when he first discovered the fraud). The court, however, failed to dismiss the cause of action against B&A. The Eighth Circuit correctly found that:

> [w]ithout any record evidence to indicate how and when United States and Piney Woods became aware of the cause of action, it was clearly erroneous simply to assume that it was on the date of the unsealing of the criminal indictment of Lawrence Blackmon. We cannot uphold the district court's fac-

tual determination in the absence of any record evidence to support it.

(App. A, p. 3a). As a matter of law, therefore, there was no record evidence sufficient to toll the statute of limitations as to any claims against B&A. The Eighth Circuit's failure to dismiss the cause of action against B&A was inconsistent with the express holding of that court. The Petitioners moved for a technical correction, but the court did not recognize or correct its error, nor did the court at any time offer any explanation for its failure to dismiss the cause of action against B&A.

The parties do not dispute that, unless the applicable statute of limitations was tolled, the actions were not timely filed (App. A, p. 2a). The statute of limitations applicable to Piney Woods' claim against B&A, presented on its behalf by the United States, is either the three-year statute of limitations for damages caused by tort or the five-year statute of limitations for damages caused by breach of contract. Ark. Stat. Ann. §§37-206,-209 (1962). The same limitations applied to the cause of action the United States brought on its own behalf against Blackmon and S-B. In order to toll either statute of limitations, Arkansas law required the United States and Piney Woods to plead and prove that the defendants fraudulently concealed the cause of action and how and when the plaintiffs first discovered the concealed facts. *Thomas v. Williford*, 259 Ark. 354, 534 S.W.2d 2, 6 (1976). Moreover, Arkansas law requires that the record must contain evidence of specific acts performed by the defendants to prevent the plaintiff from learning of the facts constituting his claim. *Rasmussen v. Reed*, 255 Ark. 1064, 505 S.W.2d 222, 224-25 (1974). The court of appeals expressly held that the United States and Piney Woods had failed to supply the required record evidence. (App. A, p. 3a).

Because the Eighth Circuit resolved the issue of tolling of the statute of limitations against the United States and Piney Woods and because the court's failure to reverse the judgment in favor of Piney Woods was inconsistent with the determination that all claims were time-barred, the Eighth Circuit's judgment in favor of Piney Woods also must be reversed.

II. The court of appeals erroneously found the Notice of Appeal deficient and limited the scope of the appeal to a review of the judgment for the United States against Blackmon and S-B.

The district court rendered judgment in favor of the United States against Blackmon and S-B and in favor of Piney Woods against B&A (App. B, p.22a-24a). Thereafter, Blackmon, B&A and S-B filed a timely notice of appeal of the judgment to the Eighth Circuit pursuant to Rule 3 of the Federal Rules of Appellate Procedure (App. C, p. 27a). The Eighth Circuit directed dismissal of the cause of action against Blackmon and S-B only. (App. A, p. 3a-4a). The court did not discuss or explain its failure to dismiss the cause of action as to B&A.

Without any guidance from the court, the Petitioners have since concluded that perhaps the Eighth Circuit did not consider the Notice of Appeal sufficient to bring an appeal from the entire judgment of the district court. A deficiency in the Notice of Appeal seems to be the only explanation for the court's bifurcated dismissal. A conclusion by the court of appeals that the Notice of Appeal was in some manner deficient is in direct conflict with applicable decisions of this Court and so far departs from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is necessary.

Rule 3(c) of the Federal Rules of Appellate Procedure sets forth the required contents of the notice of appeal. First, the notice of appeal should identify the parties taking the appeal. Petitioners satisfied this requirement by identifying Blackmon, B&A and S-B as appellants. Second, the notice of appeal should designate the judgment, order or part thereof from which the parties are appealing. Here, the appellants designated "the Final Judgment in favor of Plaintiff in the sum of $110,363.43 entered in this action on the 29th day of June, 1983," as the judgment from which the parties were appealing. (App. C, p. 27a). Rule 3(c) also requires appellants to identify the court to which the judgment is appealed. The appellants here named the Eighth Circuit as the court to which the appeal was taken. (App. C, p. 27a). The Rule also articulates a policy against dismissing an appeal for informality of form of the notice and suggests a form for a notice of appeal. (App. C, p. 31a). Petitioners' Notice of Appeal mirrors that form.

Apparently, the Eighth Circuit concluded either that Piney Woods was not included in the class of "Plaintiff" referenced in the Notice of Appeal or that the parties were not appealing the entire judgment, rendering the Notice of Appeal insufficient as to Piney Woods. Both of these conclusions are clearly erroneous and in direct conflict with applicable decisions of this Court. First, Rule 3(c) does not require that the appellees be identified. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1379 (10th Cir. 1979) (not fatal that name of one of the appellees did not appear in the caption of the notice of appeal). In the appeal at issue herein, the briefs and oral arguments unquestionably established Piney Woods as an appellee, particularly since Piney Woods participated in this action solely through the efforts of counsel for the United States. Second, the Notice of Appeal identified the judgment from which they appealed as the "Final Judgment," clearly indicating that the entire judgment was on appeal. Had the appellants sought to appeal only the judgment in favor of the United States, reference would have been made to the different orders contained within the judgment awarding damages, interest and costs to the United States, rather than to "the Final Judgment." Including the phrase "in favor of Plaintiff" with reference to the judgment appealed from, was merely descriptive and did not limit the scope of the appeal. *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977); *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508, 511 n.3 (5th Cir. 1976). The requirements of Rule 3(c) serve as a means of identification, "not as a step in appellate pleading." *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 693 (2d Cir. 1983). Moreover, if there is any ambiguity in the designation of the judgment, it should be resolved in favor of permitting the appeal. *Perington*, 631 F.2d at 1380.

If, in fact, the Notice of Appeal was in some way deficient, it was the manifest intent of the Petitioners to bring the appeal from the entire judgment, including both that portion of the judgment rendered in favor of Piney Woods against B&A and the recovery granted to the United States against Blackmon and S-B. Absent prejudice to the Respondents herein, the appeal should be construed as taken from the *entire* final judgment so that it conforms to the manifest intent of the parties. *Foman v. Davis*, 371 U.S. 178, 181 (1962); *Daily*

Mirror, Inc. v. New York News, Inc., 533 F.2d 53, 56 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976).

The Petitioners' intent to appeal from the entire judgment is substantiated by the record of the proceedings below. The only portion of the judgment which speaks to B&A is that portion awarding judgment in favor of Piney Woods against B&A. It would have been illogical for B&A to have been included in the appeal or named as an appellant had the intent to appeal from the entire judgment not been present. All issues on appeal, in particular those relating to the statute of limitations as raised by the appellants, were briefed as though applicable to all three appellants and were treated as such by both appellants and appellees. Further, the United States, on behalf of itself and Piney Woods, responded to the appeal as if the entire judgment was appealed and never raised any question that this appeal was limited to the judgment entered in favor of the United States against Blackmon and S-B only. In fact, counsel for the United States stated to Petitioners' counsel that he believed the appeal was taken as to the entire judgment.

Again, Petitioners would emphasize that Piney Woods was not prejudiced or mislead by the designation. *Foman*, 371 U.S. at 181; *St. Joseph Light & Power Co. v. Zurich Insurance Co.*, 698 F.2d 1351, 1360 (8th Cir. 1983) (mechanical application of technical requirements not required where appellee was not mislead or prejudiced); *Gunther v. E. I. DuPont de Nemours & Co.*, 255 F.2d 710, 717 (4th Cir. 1958) (technical errors which do not mislead or prejudice the appellee are insufficient for dismissing the appeal). Both sides briefed all of the pertinent issues on appeal and both sides argued the pertinent issues at oral argument as though the judgment against B&A were being considered. *See Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979). This resulted from the belief by all counsel that the entire judgment was before the Eighth Circuit on appeal. Piney Woods has never appeared in this litigation through separate counsel; rather, it has relied on the United States to represent its interests. As to its claims against Blackmon and S-B, the United States was acting as assignee of Piney Woods' claims, and as to its claims against B&A, the United States was acting on behalf of Piney Woods. Therefore, Piney Woods clearly had actual

notice of the appeal, and all counsel prosecuted the appeal as though all issues and all parties were before the court. The court of appeals should not be allowed to pretend that it was not fully advised by the Notice of Appeal as to what the Petitioners were undertaking to appeal. Obviously, the appeal was from the entire judgment. *See United States v. Arizona*, 206 F.2d 159, 161 (9th Cir.) (Judge Pope's dissent), *rev'd per curiam*, 346 U.S. 907 (1953). Moreover, the Eighth Circuit application of Rule 3 in this instance would "thwart the purpose and spirit" of the rules of procedure. *See Foman*, 371 U.S. at 181.

The court of appeals' application of Rule 3 in this case is in direct conflict with the position articulated by this Court. In *Foman*, this Court stated:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 [citations omitted]. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action."

371 U.S. at 181-82 (reversing dismissal of appeal because of failure to specify that appeal was taken from judgment as well as district court's denial of motions to vacate and amend complaints); *see State Farm Mutual Auto Insurance Co. v. Palmer*, 350 U.S. 944 (1956) (per curiam); *United States v. Arizona*, 346 U.S. 907 (1953) (per curiam); *Hoiness v. United States*, 355 U.S. 297, 300-01 (1948) (hypertechnical deviations should not operate to limit scope of appeal). This Court has clearly rejected a rule of strict construction for Rule 3. The rules of procedure "should be interpreted to prevent loss of the right of appeal, not to facilitate loss," as the Eighth Circuit's interpretation has caused here. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978). The other circuits have followed this Court's liberal interpretation. *See, e.g., Kicklighter v. Nails By Jan-*

nee, Inc., 616 F.2d 734, 739 n.1 (5th Cir. 1980); *United States v. Walker*, 601 F.2d 1051, 1057 (9th Cir. 1979); *Williams v. Frey*, 551 F.2d 932, 934 n.1 (3d Cir. 1977); *Brubaker v. Board of Education*, 502 F.2d 973, 983 n.4 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Higginson v. United States*, 384 F.2d 504, 508 (6th Cir. 1967), *cert. denied*, 390 U.S. 947 (1968) (interpreting Federal Rule 73(b), the predecessor of Rule 3(c)). Until now, the Eighth Circuit had followed the lead of this Court as well. *See Harrison v. United States*, 715 F.2d 1311, 1312-13 (8th Cir. 1983) (court allowed party not named as appellant in notice of appeal to appeal); *McGowne v. Challenge-Cook Bros., Inc.*, 672 F.2d 652, 659 (8th Cir. 1982) (notice of appeal failed to designate that appeal was from a final judgment).

An appeal should not be lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent was to appeal. *Kicklighter*, 616 F.2d at 739 n.1; *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1390 n.15 (5th Cir. 1979). The loss of the right to appeal because of an insignificant mistake is inconsistent with the general purposes of the appellate procedure and the prevailing attitude of liberal construction of procedural rules. *Comfort Trane*, 592 F.2d at 1390 n.15.

Here, the only possible error was the failure to include Piney Woods by name in the style of the Notice of Appeal. The illogical result reached by the Eighth Circuit by its bifurcated dismissal and its refusal to consider amendment of the Notice of Appeal is contrary to the prior rulings of this Court, the great weight of applicable authority, and the spirit of the rules governing the conduct of litigation in this country. Therefore, this Court should order the Eighth Circuit to amend its judgment to direct the dismissal of Petitioner Blackmon & Assoc., Inc. as well as Petitioners Lawrence W. Blackmon, Jr. and Smithwick-Blackmon, Inc.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

November, 1984

Appendix A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022

United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
V.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr.;	*	Eastern District of Arkansas
Blackmon & Assoc., Inc., and	*	
Smithwick-Blackmon, Inc.,	*	
	*	
Appellants.	*	

Submitted: April 13, 1984

Filed: June 25, 1984

Before ROSS, ARNOLD, and FAGG, Circuit Judges.

PER CURIAM.

Lawrence W. Blackmon, Jr., Blackmon & Associates, Inc. (B&A), and Smithwick-Blackmon, Inc. (SB) appeal from the district court's

judgment entered in favor of the United States of America. We reverse the judgment entered in favor of the United States and remand with directions to the district court to dismiss the action brought by the United States against Blackmon and SB as untimely filed.

This suit arises out of a contract entered into by Piney Woods and SB for the constuction of a HUD-insured multi-family housing project in Pine Bluff, Arkansas. On June 12, 1969, SB, in concert with Blackmon and B&A, submitted to Piney Woods a Certificate of Actual Costs (FHA Form 2330A) that falsely reflected the costs incurred in connection with the project's construction. On July 12, 1974, a sealed criminal indictment of Lawrence Blackmon was presented to the court in the Eastern District of Arkansas. Blackmon pled guilty to having knowingly and intentionally submitted a false Certificate of Actual Costs for the project for the purpose of influencing the actions of HUD. *See* 18 U.S.C. § 1010. On July 7, 1977, this action for breach of contract and for fraud and deceit was filed in district court by the United States on its own behalf and as assignee of claims held by Piney Woods against Blackmon and SB.

There is no dispute that in the absence of proof of tolling of the applicable statute of limitations, whether state or federal, contract or tort, this action is time-barred. Similarly, the parties do not dispute that if the running of the applicable statute of limitations was tolled until the date of the unsealing of the criminal indictment on July 12, 1974, this action was timely filed. The United States contends that the cause of action was fraudulently concealed until the unsealing of the criminal indictment on July 12, 1974, and thus the applicable statute of limitations did not begin to run until that date. Contrary to the conclusion of the district court, we find that the United States failed to carry its burden of proof with respect to tolling under the relevant federal fraudulent concealment rule and the Arkansas tolling doctrine.

Where there is fraudulent concealment of a cause of action, the statute of limitations does not begin to run against the plaintiff until the cause of action is or should have been discovered. "Fraudulent concealment comprehends two elements — the use of fraudulent

means by the party who raises the ban of the statute and successful concealment from the injured party." *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271, 278 n.9 (8th Cir. 1962) (federal fraudulent concealment rule). The federal rule requires the injured party to plead and ultimately prove "the time that plaintiff by the exercise of reasonable diligence, discovers or should have discovered the cause of action." *Id.* at 284. The Arkansas tolling doctrine places essentially the same burden of proof on a party attempting to toll the running of a limitations period. Arkansas law requires the plaintiff to show "by evidence how they came to be so long ignorant of their rights and the means used by the defendants to fraudulently keep them in ignorance, and how and when they first came to a knowledge of the [existence of the cause of action]." *Salinger v. Black*, 60 S.W. 229, 231 (Ark. 1900).

The district court, in a memorandum issued upon entry of judgment, concluded that because the criminal indictment of Lawrence Blackmon was sealed until July 12, 1974, and the records evidencing the fraud perpetrated by Blackmon, B&A, and SB were in their control, knowledge of the cause of action was not discovered until the unsealing of the criminal indictment. We find this factual determination to be clearly erroneous for want of any record evidence to support it. Although the evidence presented, taking into account the self-concealing nature of the fraud itself, may have suffficiently satisfied the United States burden of proving fraudulent concealment of the cause of action, there was no evidence presented to tie its or Piney Woods' knowledge of the fraud to the unsealing of the criminal indictment. Without any record evidence to indicate how and when the United States and Piney Woods became aware of the cause of action, it is clearly erroneous simply to assume that it was on the date of the unsealing of the criminal indictment of Lawrence Blackmon. We cannot uphold the district court's factual determination in the absence of any record evidence to support it.

Because the United States failed to meet its burden of proof with respect to tolling of the statute of limitations, we reverse the judgment entered in its favor and remand with directions to the district

court to dismiss the cause of action brought by the United States against Blackmon and SB as untimely filed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[Not to be published.]

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022-EA.	*	September Term, 1983
	*	
United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
VS.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr., ET AL.,	*	Eastern District of Arkansas
	*	
	*	
Appellants.	*	

Appellee's motion for extension of time in which to file petition for rehearing, having been considered by the Court, is hereby granted to and including July 30, 1984.

July 18, 1984

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022-EA.	*	September Term, 1983
	*	
United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
VS.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr., ETC., ET AL.,	*	Eastern District of Arkansas
	*	
	*	
Appellants.	*	

On the Court's own motion counsel for the United States is directed to respond to appellants' petition for rehearing, at the same time as said counsel files his own petition for rehearing.

July 26, 1984

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022-EA.	*	September Term, 1983
	*	
United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
VS.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr., ET AL.,	*	Eastern District of Arkansas
	*	
	*	
Appellants.	*	

Appellants' petition for rehearing, or in the alternative, motion for technical correction has been considered by the Court and is denied.

The petition of appellee for rehearing is also denied.

August 22, 1984

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022-EA.	*	September Term, 1984
	*	
United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
VS.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr., ETC., ET AL.,	*	Eastern District of Arkansas
	*	
	*	
Appellants.	*	

Leave to file appellants' "Supplemental Petition For Rehearing And Motion To Amend Or Clarify The Notice Of Appeal" is hereby denied.

September 25, 1984

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022EA	*	September Term, 1983
	*	
United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
V.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr., et al.,	*	Eastern District of Arkansas
	*	
	*	
Appellants.	*	

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District court in this cause be, and the same is hereby, reversed, and remanded with directions in accordance with the opinion of this Court.

June 25, 1984

Taxable costs of Appellants:

Clerk's docket fee:	$ 65.00
Costs of Clerk's record:	$279.00
Costs of brief:	$145.00
Total costs of Appellants for recovery from Appellee:	$489.00

A true copy:
ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT.
9/5/84

Appendix B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA — PLAINTIFF

v. LR-C-77-197

LAWRENCE W. BLACKMON, JR.,
BLACKMON & ASSOCIATES and
SMITHWICK-BLACKMON, INC., — DEFENDANTS

MEMORANDUM

This case came on for trial to the Court on March 7, 1983 at Little Rock, Arkansas. At the conclusion of the evidence the Court stated certain findings of fact and conclusions of law from the bench. The following findings and conclusions are supplementary thereto. In the event that there are any conflict or inconsistency between the findings of fact stated from the bench and the following findings of fact, the former shall control.

FINDINGS OF FACT

1. The Piney Woods Apartments, Inc. ("Piney Woods"), is the mortgagor of the Jane Oliver Apartments ("Project") located in Pine Bluff, Arkansas. The Project was constructed with mortgage proceeds insured by the Department of Housing and Urban Development (HUD) pursuant to section 221(d)(3) of the National Housing Act, 12 U.S.C. 17151(d)(3). (Stipulation, ¶¶1, 2.)

2. On November 28, 1967, Piney Woods entered into a construction contract with Smithwick-Blackmon, Inc. for the construction of the Jane Oliver Apartments in Pine Bluff, Arkansas. (Stipulation, ¶3.)

3. At all times relevant to this case, defendant Blackmon & Associates woned at least 50% of the stock of Smithwick-Blackmon, Inc. (Gov't Ex. 2, Defendant's Answer to Interrogatory No. 15.)

4. At all times relevant to this case, Lawrence W. Blackmon, Jr. was the sole owner of the Alliance Capital Corporation. (Gov't. Ex. 4, Admitted Fact No. 14.)

5. Blackmon & Associates were paid for its participation in the construction of the Jane Oliver Apartments. (Gov't. Ex. 72, Deposition of Lawrence W. Blackmon at p. 162; Gov't. Ex. 73.)

6. Blackmon & Associates employees were directly involved in the construction of the Jane Oliver Apartments. (Gov't. Ex. 72, Deposition of Lawrence W. Blackmon at 151-152, 135.)

7. Blackmon & Associates maintained the accounting records of Smithwick-Blackmon at its offices in Fort Worth, Texas. (Gov't. Ex. 2, Answer to Interrogatory 44.)

8. Lawrence W. Blackmon was a director of Smithwick-Blackmon, Inc. (Gov't. Ex. 2, Defendants' Answer to Interrogatory No. 18.)

9. Lawrence W. Blackmon represented that the company he owned, Blackmon and Associates, would participate in the construction of the Jane Oliver Apartments as the general contractor. (Gov't. Ex. 109.)

10. Lawrence W. Blackmon signed the contract of construction for the Jane Oliver Apartments and visited the Federal Housing Administration ("FHA") office in Little Rock on several occasions to discuss matters pertaining to the construction of the Jane Oliver Apartments. (Gov't. Ex. 72, Deposition of Lawrence W. Blackmon at p. 159.) Blackmon also attended the final closing on the Jane Oliver Apartments on July 8, 1969 at Little Rock. (Gov't. Ex. 67.)

11. Moreover, there is evidence which shows that Blackmon and Associates is the sole owner of Smithwick-Blackmon, Inc. (Gov't. Ex. 101.)

12. A material term of the construction contract, Article 11, required that upon completion of construction of the Project, defen-

dants would submit a certified statement of actual cost for all labor, materials and services in direct connection with construction of the project. (Gov't. Ex. 74.)

13. The defendants submitted and certified a Contractor's Certificate of Actual Cost for the Project and stated that the total actual costs incurred in the completion of construction of the Jane Oliver Apartments was $1,693,455. (Gov't. Ex. 73; Stipulation ¶9.)

14. In submitting or causing the submission of the Contractor's Certificate of Actual Cost to plaintiff Piney Woods, defendant Lawrence W. Blackmon, Jr. knowingly and intentionally falsified the total costs for construction of the Jane Oliver Apartments. (Indictment and Guilty Plea in *United States* v. *Blackmon*, Crim. No. CR-74-LR-61 (E.D. Ark. 1974), Gov't. Ex. Nos. 98, 99.)

15. Defendants falsely inflated the costs of construction on the Project by at least $75,000, and received this amount through a scheme whereby Smithwick-Blackmon, Inc. check No. 592 payable to Allied Mechanical Contractors, and Smithwick-Blackmon, Inc. check No. 593 payable to JOBCO Electric Co., were deposited in accounts controlled by defendant Lawrence W. Blackmon. (Gov't. Ex. 1, pp. 12-13, 21; Admitted facts, Gov't. Ex. 4.)

16. Defendants' fraud scheme, which allowed them to misappropriate and retain $75,000 in construction proceeds, operated as follows:

a. Lawrence W. Blackmon altered or caused to be altered the contract between Smithwick-Blackmon, Inc. and Allied Mechanical Contractors, Inc. to show that the contract between these two parties was for $398,000 rather than $349,000, the amount originally agreed to between Allied Mechanical Contractors, Inc. and Smithwick-Blackmon, Inc. (Stipulation ¶24.);

b. Blackmon issued or caused to be issued Smithwick-Blackmon, Inc. check no. 592, dated May 21, 1969, payable to Allied Mechanical Contractors, Inc. in the amount of $50,000 (Stipulation ¶25.);

c. Smithwick-Blackmon check no. 592, dated May 21, 1969, payable to Allied Mechanical Contractors, Inc. was never provided to Allied Mechanical Contractors, Inc. This check was deposited in

Account No. 00-0014-5, the Alliance Capital Corporation account at the First National Bank in Mineral Wells, Texas, on May 26, 1969 (Stipulation ¶26.);

d. Lawrence W. Blackmon issued or caused to be issued Smithwick-Blackmon check no. 593 dated May 21, 1969, payable to JOBCO Electric Company in the amount of $25,000 (Stipulation ¶27.);

e. This Smithwick-Blackmon check no. 593, dated May 21, 1969, was deposited by Blackmon & Associates employees, Lyle E. Mitchell and Annie Dale Hamm, in an account they created entitled "JOBCO Electric Company collateral trust account", account No. 129338 at the Fort Worth National Bank, Fort Worth, Texas (Admitted Facts Nos. 5, 6; Gov't. Ex. 4.);

f. On June 30, 1969, check no. 1 from account No. 129338 at the Fort Worth National Bank in the amount of $25,000 was made payable to Alliance Capital Corporation. (Admitted Fact No. 11, Gov't. Ex. 4.)

g. Check No. 1 from account No. 129338 in the amount of $25,000 ws deposited on July 1, 1969 in the checking account of Alliance Capital Corporatin at the First National Bank of Mineral Wells, Texas. (Admitted Fact No. 12, Gov't. Ex. 4.)

17. The facts and evidence in this case show conclusively that defendants concealed and misappropriated funds in the amount of $75,000 which defendants represented to Piney Woods and the FHA as payments to subcontractors who participated in the construction of the Jane Oliver Apartments. (Gov't. Ex. 73; Gov't. Ex. 1, pp. 12-13, 21; Trans. 33-37.)

18. Piney Woods relied upon the material misrepresentations of fact in the Contractor's Certificate of Actual Costs submitted by defendants and induced the Commissioner of the FHA to endorse the credit instrument for mortgage insurance on the Project in an emount that was $75,000.00 in excess of that authorized under the National Housing Act. (Testimony of Neil Maddox, Trans. p.89; Gov't. Ex. 119.)

19. The FHA, on July 8, 1969, relied upon the material misrepresentations of fact and the Contractor's Certificate of Actual

Cost submitted by defendants, and endorsed in final the mortgage note on the Project in an amount $75,000.00 in excess of that authorized under the National Housing Act. (Testimony of Neil Maddox, Trans. p.90; Gov't. Ex. 117.)

20. Article 3 of the construction contract provides that the contractor would receive a cash fee of $67,851.00 and would be reimbursed for his actual costs of construction on the project. The total cash amount payable to the contractor pursuant to Article 3 of the contract could not exceed what is described in the contract as a "cash upset" value of $1,761,306. (Gov't. Ex. 74.)

21. The contract, in Rider A, also contained an incentive payment clause which provided that if upon completion the actual cost of construction is less than the "cash upset value" (the estimated value for the total cost of construction), the contractor would be entitled to receive 50% of such difference as additional compensation in the form of an incentive payment. (Gov't. Ex. 74.)

22. The facts adduced at trial show that defendants inflated the cost of construction by $75,000. (Gov't. Exs. 1, 4.) Had defendants accurately stated the costs of constructin in the certificate of actual cost, they would have been entitled to $37,500, the difference between the cash upset value and the amounts that were actually expended in the construction of the project. (Gov't. Ex. 74.)

23. The Contractor's Certificate of Actual Cost contained a statutorily prescribed covering statement by an independent Certified Public Accountant that the Contractor's Certificate of Actual Cost "presents fairly the actual cost, in the amount of $1,693,455 of the Jane Oliver Apartments, in conformity with the generally accepted auditing principles, giving effect to the instructions issued by the Federal Housing Commissioner for the recognition of such costs." (Gov't. Ex. 73.)

24. Plaintiffs relied upon and acted to their detriment on the false material misrepresentations within the Certificate of Actual Cost made by defendants when they paid to defendants the total amount requested which corresponded directly to the Certificate of Actual Cost and was in excess of the amounts provided for in the construction contract. (Gov't. Exs. 73, 90, 119.)

25. Lawrence W. Blackmon, Jr., in his capacity as Secretary of Smithwick-Blackmon, Inc. and as the principal of the company he owned, Blackmon and Associates, acted in concert with defendant Smithwick-Blackmon, Inc. to intentionally and knowingly submit the Contractor's Certificate of Actual Cost for the Jane Oliver Apartments. In so doing, the FHA, in reliance upon the false statements contained within the Contractor's Certificate of Actual Cost, endorsed in final the insurance on the mortgage for the Project owned by Piney Woods. (Gov't. Exs. 94, 117.)

26. On July 12, 1974, a sealed criminal indictment in *United States* v. *Lawrence W. Blackmon*, Crim. No. LR-74-CR-61 (E.D. Ark. 1974), was presented to the Court, to which Lawrence W. Blackmon pleaded guilty to a violation of 18 U.S.C. §§1010 and 2(b). (Gov't. Exs. 3, 98, 99.)

27. On April 4, 1977, Piney Woods assigned all its rights, title and interst in all claims against Smithwick-Blackmon, Inc. and Lawrence W. Blackmon, Jr. to the United States. (Gov't. Ex. 70.)

28. July 12, 1974, the date of the criminal indictment, is the first date on which this claim was capable of being sued upon.

29. On July 7, 1977, the United States brought the instant action on its own behalf and "for and on behalf of" Piney Woods for fraud and deceit and for breach of contract.

CONCLUSIONS OF LAW

1. The evidence of the fraud scheme perpetrated by defendants was in the control of defendants and was unknown to plaintiff, Piney Woods, until July 12, 1974, the date on which the sealed criminal indictment was presented to the Court. *United States* v. *Blackmon*, 496 F.Supp. 12250, 1253 (E.D. Ark. 1980). Accordingly, the Court finds that the allegation and proof of fraud and concealment in evidence in this case is sufficient to toll any statute of limitation until July 12, 1974, the date upon which the criminal indictment was unsealed. *Thomas* v. *Williford*, 259 Ark. 354, 534 S.W. 2d 2, 5 (1976); *United States* v. *Blackmon, supra.*

2. The instant cause of action accrued for purposes of 28 U.S.C. §2418 on July 12, 1974, when the indictment in *United States* v. *Blackmon*, Crim No. CR-74-LR-61 (E.D. Ark. 1974) was made public. Therefore, the complaint in this case was timely filed on July 7, 1977 whether the limitations period be three years or six years. *United States* v. *Blackmon, supra* at 1253 (E.D. Ark. 1980).

3. Pursuant to the Arkansas long-arm statute, Ark. Stat. §27-2502 (1979), the Constitution of the United States, and the facts and evidence in this case, this Court has *in personam* jurisdiction over Lawrence W. Blackmon and Blackmon and Associates. *United States* v. *Blackmon, supra* at 1253 (E.D. Ark. 1980); *United States* v. *Blackmon*, No. LR-C-77-197 (E.D. Ark. Dec. 4, 1981); *Commercial Bank and Trust Co.* vs. *Dixie Sound Communications, Inc.*, 468 F.Supp. 578, 580 (E.D. Ark. 1979); *Arkansas-Best Freight System, inc.* v. *Youngblood*, 359 F.Supp. 1115, 1122 (W.D. Ark. 1973); *Martin* v. *Kelly Electric Co.*, 371 F.Supp. 1225, 1227 (E.D. Ark. 1974).

4. Pursuant to 8 U.S.C. §1345, this Court has subject matter jurisdiction over this case as the United States has sufficient interests on which to sue in its own name. *United States* v. *Blackmon, supra* at 1253 (E.D. Ark. 1980).

5. The Arkansas Supreme Court has recognized a cause of action for "the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another." *Mazander* v. *Reed*, 233 Ark. 511, 514, 345 S.W. 2d 469, 471 (1961) (quoting *Arkansas Valley Compress and Warehouse Co.* v. *Morgan*, 217 Ark. 161, 229 S.W. 2d 133, 136 (1950)).

6. The elements of fraud and deceit are (1) defendants' false representation of fact, (2) defendants' knowledge or belief that the representation is false, (3) defendants' intent to induce plaintiff's reliance on the misrepresentation, (4) plaintiff's justifiable reliance, and (5) plaintiff's damage resulting from the reliance. *Bishop* v. *Tice*, 622 F.2d 349, 358 (8th Cir. 1980); *W. Prosser, Law of Torts*, §105 at 685-86 (4th Ed. 1971).

7. The intent required under Arkansas law for fraud and deceit

is satisfied here where the defendant has been shown to have made a willful and knowingly false statement which defendant knew would be relied upon by the mortgagor, Piney Woods. In Arkansas, representations are considered to be fraudulent if made by one who either knows them to be false or else, not knowing, asserts them to be true. *Crowley* v. *Baker*, 237 Ark. 136, 140, 371 S.W. 2d 830, 832 (1963); *Maurice* v. *Chafin*, 219 Ark. 273, 277, 241 S.W. 2d 257, 259 (1951); *City National Bank* v. *Sternberg*, 195 Ark. 503, 114 S.W. 2d 39, 43, *cert. denied*, 305 U.S. 614, *reh. denied*, 305 U.S. 671 (1938).

8. Lawrence W. Blackmon, Jr., Blackmon and Associates, and Smithwick-Blackmon, Inc., as jint tort feasors, are jointly and severally liable for the entire damage caused by their tortious conduct. *Prosser, Law of Torts*, §46, pp. 291-293 (4th ed. 1971).

9. The Arkansas Supreme Court in *Fireman's Insurance Co. of Newark, New Jersey* v. *Jones*, 245 Ark. 179, 185, 431 S.W. 2d 728, 731 (1968), stated:

> We have consistently held that in actions against joint tort feasors where a joint relationship is alleged, there may be a recovery against all the defendants or against any one of them if the proof of warrants a finding of his participation in the tort. *Patterson* v. *Risher*, 143 Ark. 376, 221 S.W. 468 (1920).

Accordingly, as the proof in this case demonstrates the joint participation of all defendants, recovery may be obtained against all the defendants or against each defendant independently.

10. On the basis of the false statements contained within the Contractor's Certificate of Actual Cost, Piney Woods was induced to mistakenly pay excess consideration to defendants than was required under Article 3 of the construction contract. Plaintiffs are entitled to recover this money paid to defendants as restitution. To do otherwise would result in the unjust enrichment of defendants. *Frigillana* v. *Frigillana*, 266 Ark. 296, 305-307, 584 S.W. 2d 30, 34-35 (1979); *Patton* v. *Brown-Moore Lumber Co.*, 173 Ark. 128, 133, 292 S.W. 383, 385 (1927).

11. Under Arkansas law, a party who has conferred a benefit upon

another induced by fraud and deceit is entitled to restitution when the benefit conferred is caused by reliance upon a fraudulent misrepresentation. *Frigillana* v. *Frigillana, supra; Shultz Construction Co.* v. *Crawford County Bank*, 182 Ark. 569, 575, 32 S.W. 2d 177, 179 (1930); Restatement of the Law of Restitution, §55 (1937).

12. It is clear from the statements made by defendant Lawrence W. Blackmon contained in the records of the criminal case, *United States* v. *Blackmon*, Crim. No. LR-74-CR-61 (E.D. Ark.), the admitted facts and the facts adduced at trial, that defendants' conduct was a conscious, deliberate act of fraud. Lawrence W. Blackmon, the building contractor who participated in this fraud scheme against the non-profit trust, had previously participated as a contractor in over 17 FHA insured multi-family projects (Gov't. Ex. 109). Accordingly, defendants had knowledge and experience with the federal regulations governing the construction of this HUD subsidized project. Their actions stand as an egregious attempt to defraud the owners of the project.

13. The evidence adduced at trial conclusively shows that defendants' fraud was an intentional acheme to defraud the non-profit trust, the owner of the Jane Oliver Apartments. There is evidence showing that defendant acted with malice, willfulness, and with conscious indifference to the consequences of their acts. An award of punitive damages is, therefore, appropriate. *St. Louis I. M. and S. Ry. Co.* v. *Dysart*, 89 Ark. 261, 262-63, 116 S.W. 224, 227 (1909); *Choctaw Oklahoma and Gulf Ry Co.* v. *Cantwell*, 78 Ark. 331, 95 S.W. 771, 772 (1906).

14. This court will apply the same principles given effects in *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 1043, 479 S.W. 2d 518, 522 (1972), where the Arkansas Supreme Court concluded:

> If, then, there was evidence tending to show that appellant intentionally performed a deliberate act with the intention of misleading a prospective purchaser about a material matter to his injury, it was proper to mpermit the jury to consider the award of exemplary or punitive damages.

15. Under those circumstances, and under the facts and evidence adduced at trial, it would be appropriate under Arkansas law to make an award of punitive damages. *Satterfield* v. *Rebsamen Ford, Inc.*, 253 Ark. 181, 185, 485 S.W. 2d 192, 195 (1972). This Court will award plaintiff punitive damages against defendant in the amount of $37,500.00.

16. Under Arkansas law, prejudgment interest is allowed, whether the claim sounds in tort or in contract, where the damage susteined is capable of exact determination both in time and in amount. *Red Lobster Inns of America, Inc.* v. *Lawyers Title Ins. Corp.*, 656 F.2d 381, 386 (8th Cir. 1981); *Lowell* v. *Marianna Federal S. & L. Ass'n.*, 267 Ark. 164, 589 S.W. 2d 577, 578 (1979); *Advance Construction Co., Inc.* v. *Dunn*, 263 Ark. 232, 236, 563 S.W. 2d 888, 890; *Loomis* v. *Loomis*, 221 Ark. 743, 746-47, 255 S.W. 2d 671 (1953).

17. On July 8, 1969, the date on which the closing on the Project occurred, defendants received and retained $75,000 in excess of the amounts which should have been paid to them under the terms of the contract. (Gov't Exs. 90,100.)

18. In calculating plaintiff's damages, the incentive clause in Rider A of the construction contract will be taken into consideration. Accordingly, plaintiff's damages will be half of the amount falsely inflated, or $37,500.00.

19. Therefore, plaintiffs are entitled to a return of the $75,000, plus interest from the date of their loss, July 8, 1969, at the rate of 6% per annum as required th ARK. CONST. Art. 19, §13, until the date judgment is entered herein. *Lovell* v. *Marianna Federal S. & L. Ass'n., supra; Advance Construction Co., Inc.* v. *Dunn, supra; Loomis* v. *Lomis, supra.*

20. Pursuant to the Federal Interest Statute, 28 U.S.C. §1961, this civil judgment will bear interest calculated from the date of entry of this judgment, "at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment." 28 U.S.C. §1961(a).

CONCLUSION

Defendants are liable to Piney Woods Apartments, Inc. and the United States for the common law tort of deceit, and for breach of contract for damages in the amount of $37,500.00, which liabilities shall merge in the judgment to be entered herein.

Defendants are also liable to the United States and Piney Woods Apartments, Inc. in the amount of $37,500.00 for punitive damages.

Defendants are also liable for prejudgment interest at the rate of 6%, post-judgment interest at the rate of 9.59%, and for costs necessarily incurred in this matter.

Dated this 29th day of June, 1983.

/s/ Garnett Thomas Eisele

United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. LR-C-77-197
	)	
LAWRENCE W. BLACKMON, JR.,	)	
BLACKMON & ASSOCIATES and	)	
SMITHWICK-BLACKMON, INC.,	)	
	)	
Defendants	)	

ORDER FOR JUDGMENT
AND JUDGMENT

Upon consideration of the evidence adduced at trial, the proposed findings of fact and conclusions of law submitted by the parties, the admitted facts, and the entire record herein, and for the reasons stated in the accompanying memorandum, it is by the Court this 29th day of June, 1983,

ORDERED: that judgment be, and hereby is, entered for the plaintiff United States of America in the amount of $37,500.00 for compensatory damages against Lawrence W. Blackmon, Jr. and Smithwick-Blackmon, Inc., jointly and severally; and it is further

ORDERED: that judgment be, and hereby is, entered for the plaintiff United States of America against Lawrence W. Blackmon and Smithwick-Blackmon, Inc., jointly and severally, in the amount of $37,500.00 in punitive damages; and it is further

ORDERED: that judgment be, and hereby is, entered for plaintiff

Piney Woods Apartments, Inc., jointly and severally, against Blackmon and Associates for $37,500.00 in compensatory damages; and it is further

ORDERED: that judgment be, and hereby is, entered for plaintiff Piney Woods Apartments, Inc., jointly and severally, against Blackmon and Associates in the amount of $37,500.00 in punitive damages; and it is further

ORDERED: that the total amount paid by defendants to plaintiffs for compensatory damages will not exceed $37,500.00 exclusive of interest, and that the total amount paid by defendants to plaintiffs for punitive damages will not exceed $37,500, exclusive of interest; and it is further

ORDERED: that prejudgment interest at the rate of 6% shall be assessed on the judgment of $37,500.00 in compensatory damages from the date of July 8, 1969 until the date judgment is entered; and it is further

ORDERED: that interest at the rate of 9.59% shall be assessed on the entire post-judgment debt, computed daily and compounded annually until paid in full; and it is further

ORDERED: that Lawrence W. Blackmon, Jr., Smithwick-Blackmon, Inc. and Blackmon and Associates shall pay all costs incident to these proceedings to plaintiff United States of America, said costs determined pursuant to 28 U.S.C. §1921 in the amount of $1,201.49.

ACCORDINGLY, it is

ORDERED: that defendants Lawrence W. Blackmon, Jr., and Smithwick-Blackmon, Inc. tender to plaintiff, the United States of America, the sum of $110,363.43 (principle [sic] of $37,500 and itnerest [sic] thereon of $31,087.07 through the date of judgment plus $37,500 in punitive damages and costs in the amount of $1,209.49). Interest on the entire debt will accrue pursuant to 28 U.S.C. §1961 from the date of judgment at the legal rate of 9.59% computed daily and compounded annually until paid in full, or, alternatively, it is further

ORDERED: that defendant Blackmon & Associates tender to plaintiff, Piney Woods Apartments, Inc., the sum of $110,363.43 (principle [sic] of $37,500 and interest thereon of $31,087.07 through the date of judgment plus $37,500 in punitive damages and costs in the amount of $1,209.49.) Interest on the entire debt will accrue pursuant to 28 U.S.C. §1961 from the date of judgment at the legal rate of 9.59% computed daily and compounded annually until paid in full.

DATED: June 29, 1983

/s/ Garnett Thomas Eisele

United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. LR-C-77-197
	)	
LAWRENCE W. BLACKMON, a/k/a LARRY BLACKMON, BLACKMON & ASSOCIATES, INC., and SMITHWICK-BLACKMON,	)	
	)	
Defendants.	)	

ORDER

Pursuant to the June 25, 1984 *per curiam* decision and the mandate issued September 5, 1984, of the Eighth Circuit Court of Appeals, it is hereby Ordered that the judgment against Lawrence W. Blackmon and Smithwick-Blackmon, in favor of the United States entered on June 29, 1983, be, and it is hereby, set aside. The judgment entered on June 29, 1983 against Blackmon & Associates in favor of Piney Woods Apartments, Inc. remains in full force and effect. It is further Ordered that the case against Lawrence W. Blackmon, Jr. and Smithwick-Blackmon, be, and it is hereby, dismissed.

It is so Ordered this 18th day of October, 1984.

/s/ Garnett Thomas Eisele

United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. LR-C-77-197
	)	
LAWRENCE W. BLACKMON, JR.,	)	
BLACKMON & ASSOC., INC. and	)	
SMITHWICK-BLACKMON, INC.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Lawrence W. Blackmon, Jr., Blackmon & Assoc., Inc., and Smithwick-Blackmon, Inc., Defendants in the above entitled and numbered cause of action, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Final Judgment in favor of Plaintiff in the sum of $110,363.43 entered in this action on the 29th day of June, 1983.

Respectfully submitted,

WINSTEAD, MCGUIRE,
SECHREST & MINICK
1700 Mercantile Dallas Building
Dallas, Texas 75201
(214) 742-1700

By_____
Allen W. Kimbrough
W. Mike Baggett

ATTORNEYS FOR DEFENDANTS

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022

United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
V.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr.; Blackmon & Assoc., Inc., and Smithwick-Blackmon, Inc.,	*	Eastern District of Arkansas
	*	
Appellants.	*	

APPELLANTS' PETITION FOR REHEARING BY PANEL, OR IN THE ALTERNATIVE, MOTION FOR TECHNICAL CORRECTION

TO THE HONORABLE CIRCUIT JUDGES ROSS, ARNOLD, and FAGG:

Pursuant to Fed. R. App. P. 40 and Eighth Circuit Rule 15, Appellants LAWRENCE W. BLACKMON, JR., (Blackmon), BLACKMON & ASSOC., INC. (B&A) and SMITHWICK-BLACKMON, INC. (SB) file this their Petition for Rehearing by

Panel, or in the alternative, Motion for Technical Correction of the *per curiam* opinion filed by this Panel of the Court on June 25, 1984, and in support of same would state as follows:

I.

Appellants believe that this Court correctly applied the doctrines expressed in the federal fraudulent concealment rule [as stated in *Kansas City, Missouri v. Federal Pacific Electric Co.*, 210 F.2d 271, 278 (8th Cir. 1962)] and the Arkansas tolling doctrine [found in *Salinger v. Black*, 60 SW 229, 231 (Ark. 1900)] to the facts of this case and properly dismissed Blackmon & SB, but did not dismiss B&A. Appellants suggest that this was an error or an oversight.

II.

This Court correctly found that

> "[w]ithout any record evidenced to indicate how and when United States and Piney Woods became aware of the cause of action, it was clearly erroneous simply to assume that it was on the date of the unsealing of the criminal indictment of Lawrence Blackmon. We cannot uphold the district court's factual determination in the absence of any record evidence to support it."

Opinion, p. 3. Therefore, as a matter of law, there is no record evidence sufficient to toll the statute of limitations as to any claims against B&A and to exclude B&A from the dismissal would be an illogical result of this appeal. See Brief of Appellants, pp. 8-13.

Consequently, Appellants urge that the opinion of this Court be revised to add a reversal of the judgment entered against B&A on June 29, 1983 and to remand with further direction to the district court to dismiss the cause of action brought against B&A (as well as against Blackmon & SB) as untimely filed.

WHEREFORE, Appellants pray that the relief sought in this Petition for Rehearing by Panel, or in the alternative, Motion for

Technical Correction, be in all things granted.

Respectfully submitted,

WINSTEAD, MCGUIRE,
SECHREST & MINICK
1700 Mercantile Dallas Building
Dallas, Texas 75201
(214) 742-1700

By /s/ Allen W. Kimbrough
W. Mike Baggett
Allen W. Kimbrough

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6 day of July, 1984, a copy of the foregoing was mailed to the following counsel:

Mr. Richard Silber
U.S. Department of Justice
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20004

Mr. Richard M. Pence, Jr.
Assistant U.S. Attorney
P.O. Box 1229
Little Rock, Arkansas 72203

/s/ Allen W. Kimbrough
Allen W. Kimbrough

APPENDIX OF FORMS

Form 1.

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the _____ District
of _____

File Number _____

A. B., Plaintiff

v. **Notice of Appeal**

C. D., Defendant

Notice is hereby given that C. D., Defendant above named, hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the _____ day of _____.
_____, 19____.

(s) _____
Attorney for C.D.

_____
(Address)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-2022

United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	
V.	*	District Court for the
	*	
Lawrence W. Blackmon, Jr.;	*	Eastern District of Arkansas
Blackmon & Assoc., Inc., and	*	
Smithwick-Blackmon, Inc.,	*	
	*	
Appellants.	*	

APPELLANTS' SUPPLEMENTAL PETITION FOR REHEARING BY PANEL AND MOTION TO AMEND OR CLARIFY NOTICE OF APPEAL

TO THE HONORABLE CIRCUIT JUDGES ROSS, ARNOLD, and FAGG:

Appellants Lawrence W. Blackmon, Jr. ("Blackmon"), Blackmon & Assoc., Inc. ("B&A"), and Smithwick-Blackmon, Inc. ("SB") file this their supplemental petition for rehearing by panel and motion to amend or clarify notice of appeal and in support of same would state as follows:

I.

Judgment was entered in the Eastern District of Arkansas on June 29, 1983 in favor of the United States of America ("United States") against appellants Blackmon and SB and in favor of Piney Woods Apartments ("Piney Woods") against appellant B&A (the "Judgment"; Exhibit A). Thereafter, *all three* appellants (Blackmon, B&A, and SB) on June 28, 1983, filed a timely notice of appeal to this Court pursuant to Rule 3, Fed. R. App. P., of the Final Judgment "in favor of Plaintiff" (Exhibit B). Following the submission of briefs to the Court and oral argument presented to this panel, a *per curiam* opinion was filed on June 25, 1984 (Exhibit C) directing dismissal of the Judgment as to Blackmon and SB only. Thereafter, on July 9, 1984, the three appellants filed a petition for rehearing by panel, or in the alternative, motion for technical correction (Exhibit D), and the United States filed its petition for rehearing by panel and response to appellants' petition for rehearing on or about July 30, 1984 (Exhibit E). Both petitions were denied by order of this Court entered on August 22, 1984 (Exhibit F). Appellants herein seek rehearing both as to the *per curiam* opinion of June 25, 1984, and the Order entered August 22, 1984.

II.

This Court's opinion of June 25, 1984, dismissed the Judgment (for the cause of action having been untimely filed) as to appellants Blackmon and SB, but did not explain in its opinion the lack of dismissal as to B&A, which had been sought in appellants' brief on appeal and urged by appellants at the time of oral argument. In attempting to ascertain a possible reason for the Court's action, and only after appellants filed their petition for rehearing herein (Exhibit D), did counsel for appellants review the entire record and consider for the first time that Piney Woods somehow might not be included in the category of Plaintiff as stated in the notice of appeal. That omission would be the only logical explanation for the Court's bifurcated dismissal. However, as will be demonstrated from the facts that follow, it was the manifest intent of the appellants to bring this appeal from the entire Judgment and to appeal from that portion of

the Judgment rendered in favor of Piney Woods against appellant B&A, as well as the recovery granted to the United States against the other two appellants. Absent prejudice to the appellees herein, the appeal should be construed as taken from the entire final Judgment in order to conform it to the manifest intent of the parties. *McGowne v. Challenge-Cook Bros., Inc.*, 672 F.2d 652 (8th Cir. 1982). Therefore, if amendment or clarification of notice be necessary, appellants should be permitted to amend or clarify their notice of appeal (and the appellate documents which flowed therefrom) accordingly.

III.

The Appellants' intent to appeal from the entire Judgment can be substantiated by the following:

a. The only portion of the Judgment which speaks to B&A is that portion awarding Judgment in favor of Piney Woods against B&A. It would have been illogical for B&A to have been included in the appeal or named as an appellant had the intent to appeal from the entire Judgment not been present.

b. All issues on appeal (in particular those relating to the statute of limitations as raised by appellants) were briefed as though applicable to *all three* appellants and were treated as such by both appellants and appellee.

c. The United States (on behalf of itself and Piney Woods) has responded to this appeal on the apparent basis that the entire Judgment was the subject of this appeal and has never raised any question that this appeal was limited to Judgment entered in favor of the United States against Blackmon and SB only. In fact, counsel for the United States has stated to appellants' counsel that he believed the appeal was taken as to the entire Judgment.

IV.

Rule 3(c), Fed. R. App. P., provides, in pertinent part:

The notice of appeal shall specify the party or parties taking

> the appeal; shall designate the judgment, order of part thereof appealed from; and shall name the court to which the appeal is taken.

Rule 3(c) does not require that the intended appellees be identified in the notice of appeal. However, appellants stated in their notice that they were appealing the final judgment "in favor of Plaintiff." "Plaintiff" was intended to refer to *both* the United States *and* Piney Woods, who participated in this action solely through the efforts of counsel for the United States. The failure to include Piney Woods as a named appellee was not the result of any desire by Defendants to limit the appeal. The omission of Piney Woods constituted "harmless error" pursuant to the doctrine established by the Supreme Court in *U. S. v. Arizona*, 346 U.S. 907 (1953) and the cases which followed thereafter. Those cases stand for the proposition that the rules concerning contents of a notice of appeal to a court of appeals should be liberally construed in favor of sufficiency of the notice. See also, *Higginson v. U.S.*, 384 F.2d 504 (6th Cir. 1967), cert. denied, 390 U.S. 947, reh. denied 391 U.S. 961 (1968).

In a recent case in which a court of appeals was faced with a situation similar to that at bar, the court stated that "[n]othing in the rules requires a listing of the appellees; thus, it is not fatal that Carpenter did not appear in the caption of the notice of appeal." *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1379 (10th Cir. 1980). The court found that suitable notice of Carpenter's role as an appellee had been provided by other means. In the appeal at issue herein, there is no question that Piney Woods' role as an appellee was established by the briefs and through oral argument.

V.

This Court has in prior cases permitted the amendment of a timely filed notice of appeal to include a party not listed as an *appellant*, where the preparer overlooked that party's name in preparing the notice of appeal. *Harrison v. U.S.*, 715 F.2d 1311 (8th Cir. 1983). In the case at bar, the appellants seek to amend or clarify their notice of appeal for the purpose of clarifying Piney Woods participation in this appeal as a plaintiff. This lack of clarification has apparently

resulted in only a partial dismissal of the Judgment by this Court. Again, appellants would emphasize that appellee was not prejudiced or mislead by the designation. *U.S. v. Walker*, 601 F.2d 1051 (9th Cir. 1951). Both sides briefed all of the pertinent issues on appeal and both sides argued the pertinent issues at oral argument as though the Judgment against B&A were being considered. *See, Comfort Trane Air Condit. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979). As stated earlier, this resulted from the belief by all counsel that the entire Judgment was before this Court on appeal.

VI.

As is illustrated in part by the copy of the district court's docket sheet attached hereto as Exhibit G (i.e., Piney Woods is not listed as a plaintiff), there has been continuing confusion with respect to proper parties to this litigation. Originally, the United States of America was the sole plaintiff and remained as such until Piney Woods Apartments became a named plaintiff at the time of the filing of Plaintiffs' Amended and Substituted Complaint on or about October 10, 1980. A review of the record on appeal will reveal to the Court that the name "Piney Woods Apartments" does not appear in the style of any of the pleadings filed thereafter and only rarely does even an "et al" appear to indicate to one not intimately familiar with the record that the United States did not stand alone as plaintiff. Hence the origin of the apparent oversight in not reversing the entire Judgment.

VII.

Piney Woods has never appeared in this litigation through separate counsel; rather, it has relied on the United States to represent its interests herein. As to its claims against Blackmon and SB, the United States was acting as assignee of Piney Woods' claims, and as to its claims against B&A, the United States was acting on behalf of Piney Woods. Therefore, it is without dispute that Piney Woods had actual notice of the instant appeal, and all counsel have prosecuted the appeal as though all issues (and, thus, all parties) were before this Court.

VIII.

It is clearly in the interests of justice for this Court to grant appellants the relief sought herein and to dismiss the Judgment rendered by the district court in its entirety. This Court found in its opinion that:

> without any record evidenced to indicate how and when United States *and Piney Woods* became aware of the cause of action, it is clearly erroneous simply to assume that it was on the date of the unsealing of the criminal indictment of Lawrence Blackmon. We cannot uphold the district court's factual determination in the absence of any record evidence to support it.

(Opinion, page 3; June 25, 1984) [emphasis supplied]. Absent the apparent clerical problems of including both plaintiffs in the reversal of the Judgment, it is evident that this Court would have dismissed the Judgment in its entirety based on the statute of limitations grounds set forth in its Opinion. The objections raised by the United States in its petition for rehearing relate *only* to its disagreement with the Court's ruling with respect to the legal bases for the opinion. The United States does not in any way address the issue that appellants intended only to appeal from a portion of said Judgment. In fact, the United States has conceded in its petition for rehearing (at page 8-9) that "if this Court intended to reverse the judgment entered in the district court against all three appellants then appellee has no objection to appellants' petition for rehearing." That statement serves as further evidence that the United States assumed (as did the appellants) that the entire Judgment is on appeal and that no undue prejudice to appellees would result from this Court granting to appellants the relief sought herein.

CONCLUSION

Based on the foregoing arguments and legal authorities, appellants respectfully request that this Court grant to appellants the following relief:

a. That appellants' notice of appeal (and the appellate record based thereon) be amended or clarified to add Piney Woods Apartments in order to conform with the briefs of all parties, the arguments of

counsel, and the manifest intent of the parties with respect to an appeal from the entire final Judgment of the district court; and

b. That upon rehearing hereof, this Court amend its *per curiam* opinion of June 25, 1984 to order the district court to dismiss the Judgment as to Blackmon & Assoc., Inc., as well as to Lawrence W. Blackmon, Jr. and Smithwick-Blackmon, Inc.

WINSTEAD, MCGUIRE,
SECHREST & MINICK
1700 Mercantile Dallas Building
Dallas, Texas 75201
(214) 742-1700

By /s/ Allen W. Kimbrough
W. Mike Baggett
Allen W. Kimbrough

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4 day of September, 1984, a copy of the foregoing was sent via certified mail, return receipt requested, to the following counsel of record:

Mr. Richard Silber
U.S. Department of Justice
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20004

Mr. Richard M. Pence, Jr.
Assistant U.S. Attorney
P.O. Box 1229
Little Rock, Arkansas 72203

/s/ Allen W. Kimbrough
Allen W. Kimbrough

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

ALLEN W. KIMBROUGH, being duly sworn, deposes and says:

1. That he is one of the attorneys for Lawrence W. Blackmon, J., Blackmon & Assoc., Inc. and Smithwick-Blackmon, Inc., the appellants herein;
2. That he prepared and has read the above and foregoing appellants' supplemental petition for rehearing by panel and motion to amend or clarify notice of appeal; and
3. That all the statements made in said pleading are within his personal knowledge and are true and correct.

/S/ Allen W. Kimbrough
Allen W. Kimbrough

SUBSCRIBED AND SWORN TO BEFORE ME this 30th day of August, 1984, to certify which witness my hand and seal of office.

/S/ Sue Ann Alexander
Notary Public, State of Texas

Sue Ann Alexander
Notary Type or Print Name

[SEAL]

My Commission Expires:

12/31/84